IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE V.GIRI

WEDNESDAY, THE 24TH OCTOBER 2007 / 2ND KARTHIKA 1929

WP(C).No. 6643 of 2006(N)

PETITIONERS:

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1. **VISWAMBHARAN.K.B, S/O.BALAKRISHNAN,**
   AGED 46 YEARS, DVR.PC.4223P, ARMED RESERVE CAMP,
   PALAKKAD.

2. **K.RAMACHANDRAN, S/O.P.K.NAIR,**
   DVR.HC.3874P, ARMED RESERVE CAMP,
   PALAKKAD.

3. **KANNAN.R, S/O.RAMAN,**
   DVR.PC.4904P, ARMED RESERVE CAMP,
   PALAKKAD.

4. **SIVADAS.K.P, S/O.P.T.GOPALAN NAIR,**
   DVR.PC.4905P, ARMED RESERVE CAMP,
   PALAKKAD.

5. **ABOOBACKER.K, S/O.C.KABEER,**
   DVR.PC.4922P, ARMED RESERVE CAMP,
   PALAKKAD.

6. **VINODAN.K.P, S/O.KANARAKUTTY,**
   DVR.PC.4533, ARMED RESERVE CAMP,
   PALAKKAD.

7. **MOHANACHANDRAN.K, S/O.NARAYANAN NAIR,**
   DVR.HC.3896P, ARMED RESERVE CAMP,
   PALAKKAD.

8. **BHAKTAVALSALAN.K.V, S/O.K.P.VELANDI,**
   DVR.HC.3958P, CBCID, PALAKKAD.

W.P.(C). NO.6643/2006:

9. C.V.SURENDRAN, S/O.VELU,
DVR.PC.4929P, CBCID, PALAKKAD.

BY ADV. SRI.JACOB SEBASTIAN.

RESPONDENTS:
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1. STATE OF KERALA,
REP. BY ITS SECRETARY TO GOVT.,
FINANCE (PRC-A) DEPARTMENT,
SECRETARIAT, THIRUVANANTHAPURAM.

2. THE PRINCIPAL SECRETARY TO GOVERNMENT,
DEPARTMENT OF HOME (K DEPT),
GOVT. SECRETARIAT, THIRUVANANTHAPURAM.

3. THE DIRECTOR GENERAL OF POLICE,
THIRUVANANTHAPURAM.

4. THE SUPERINTENDENT OF POLICE,
PALAKKAD.

BY SR. GOVERNMENT PLEADER SRI. P. NANDAKUMAR.

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 18/09/2007,ALONG WITH W.P.(C). NO. 11896/ 2007, 24626/2007, & 10053/2006,THE COURT ON 24/10/2007, DELIVERED THE FOLLOWING:

W.P.(C). NO.6643/2006-N:

APPENDIX

PETITIONER'S EXHIBITS:

EXT.P.1: COPY OF THE G.O. (P). NO. 622/03/FIN. DTD. 26TH NOVEMBER, 2003.

EXT.P.2: COPY OF THE LETTER DTD. 05/08/05 OF THE R.2.

EXT.P.3: COPY OF THE ORDER DTD. 31/08/05 OF THE INSPECTOR GENERAL OF POLICE, STATE CRIME RECORDS BUREAU.

EXT.P.4: COPY OF THE ORDER DTD. 18/11/05 OF THE COMMANDANT, STATE RAPID ACTION FORCE, PANDIKKAD.

EXT.P.5: COPY OF THE ORDER DTD. 27/06/05 OF THE INSPECTOR GENERAL OF POLICE, (TRAINING) AND JOINT DIRECTOR.

EXT.P.6: COPY OF THE ORDER DTD. 29/09/05 OF THE COMMANDANT, KAP 5TH BATALION, MANIYAR, PATHANAMTHITTA.

EXT.P.7: COPY OF THE REPRESENTATION DTD. 06/12/04 SUBMITTED BY THE P.1.

EXT.P.8: COPY OF THE REPRESENTATION DTD. 11/01/05 SUBMITTED BY THE P.2.

EXT.P.9: COPY OF THE REPRESENTATION DTD. 15/11/04 SUBMITTED BY THE P.3.

EXT.P.10: COPY OF THE REPRESENTATION DTD. 24/12/04 SUBMITTED BY THE P.4.

EXT.P.11: COPY OF THE COMMUNICATION DTD. 30/08/05 ISSUED FROM THE OFFICE OF THE R.4.

RESPONDENT'S EXHIBITS: NIL.

//TRUE COPY//

prv.

V.GIRI, J.

W.P.(C).Nos.6643 & 10053 of 2006
11896 & 24626 of 2007

Dated this the 24th day of October, 2007.

JUDGMENT

The petitioners in these writ petitions are Ex-servicemen, who were re-employed in the Police Department, after they had completed the requisite number of years of service in the Army, so as to qualify for pension, related to Military Service. Common issues arise for consideration in these writ petitions and they have been heard together and are being disposed of by this common judgment. W.P.(C) No.10053/06 is taken as the leading case for convenience.

2. The first petitioner was discharged from the Army, after completing 17 years and 11 months. The second petitioner was discharged after completing 16 years and 10 months and the 3rd petitioner was discharged after completing 17 years. All of them were enlisted in the Police Force on discharge from the Army. By Ext.P1 order dated 26.11.2003 the Government ordered that War/Military Service which counts for civil pension would be reckoned for computing the qualifying service for the grant of only the first higher grade. In

Ext.P2 order issued by the first respondent, as a clarification it was further mentioned that War/Military Service which counts for civil pension alone will be reckoned as a qualifying service for the grant of higher grade. The petitioners were granted the first higher grade vide Exts.P6, P7 and P8 orders issued on 27.6.2005. They received the monetary benefits consequent upon the sanctioning of the higher grade. But, within a few months from the sanctioning of the higher grade, the Head of the Department, the 4th respondent, cancelled the same as per Ext.P9 order. There was also a direction for refund of the benefits, which were allegedly illegally sanctioned. Petitioners sought for a review of Ext.P9. That has not been done. Petitioners are drawing pension for their services rendered in the Army. They contend that, accordingly, they are entitled to the higher grade provided in Ext.P1 Government Order. Alternatively, it is contended that the 4th respondent erred in ordering recovery of the monetary benefits already paid to the petitioners. It is contended that the petitioners did not contribute to any error resultant upon which the higher grade was sanctioned to the petitioners.

Petitioners, therefore, challenge Ext.P9 and also seek appropriate direction restraining the respondents from recovering the amounts which have already been disbursed to them consequent upon the sanctioning of the higher grade to them.

3. First respondent-Government has filed a counter affidavit. Reference is made to Rule 8 (c) of Part III of the Kerala Service Rules, which provides that Ex-servicemen, who are re-employed in civil service shall be allowed to count their Military service other than War service in the Armed Forces of India from the 1st of April, 1946, if such service is not pensionable or pensionable under the Military Rules, which is terminated before a pension has been earned in respect of it, for the purpose of civil pension. Further, persons who seek the benefit of Rule 8 (c) should refund any bonus or gratuity received by them for the period of Military service. It is further provided that the person concerned should not be in receipt of any Military pension in respect of his Military service. Thus, those who are in receipt of Military pension are not eligible for time bound higher

grade reckoning War/Military service, which otherwise will not be reckoned for civil pension. In the circumstances, the grant of first time bound higher grade promotion to the petitioners, in the year 2005, barely two years of their commencement of civil service was illegal. It is admitted by the petitioners that they are in receipt of pension attributable to their Military service. Consequently, the service attributable to Military Pension cannot be reckoned for civil pension. Therefore, the orders cancelling the grant of time bound higher grade, which can be done only after the petitioners complete 10 years of service in the Police Department are clearly justified.

4. It is further contended that the refund of amounts which has already been illegally received is also justified. Reference is made to Rule 3 (C) of Part III of Kerala Service Rules which enables such recovery.

> **"3-C. Notwithstanding anything contained in these rules, recovery of excess payments made to an officer by mistake within a period of four years before his retirement [and which are detected within a period of four years after retirement] may be made from his pension and other amounts due to him after retirement subject to the condition that such**

> **deduction if made from his pension shall be effected only in monthly instalments in whole rupees and that the amount of each instalment shall not exceed 10 percent of the monthly pension admissible to him."**

5. I have heard learned counsel for the petitioners Sri.Jacob Sebastian and Sri.Nandakumar, Senior Government Pleader appearing on behalf of the respondents. In my view, two questions arise for consideration:

(a) Whether the petitioners were entitled to receive the benefit of the first higher grade time bound promotion, which is granted on completion of 10 years of service, by reckoning their Military Service also.

(b) Assuming that they were not so entitled to the grant of first time bound higher grade in the year 2005, is the direction for refund of the monetary benefits already received by them justified?

6. As regards issue No.1, the eligibility of the petitioners for the first time bound higher grade by reckoning their War/Military service is dependent on G.O.(P)

No.622/03/Fin dated 26.11.2003. Sub-clauses (1) and (2) of Clause 3 of the said order are relevant:

> **"(i) In the case of non-gazetted officers, War/Military service which counts for civil pension will be reckoned for sanctioning 13/10, 20 and 25 years higher grade for the period from 1.7.1979 to 29.2.1992.**
>
> **(ii) In the case of gazetted officers, War/Military service which counts for civil pension will be reckoned for only one higher grade with effect from 1.7.1988."**

7. Thus, the War/Military service, which is reckoned for sanctioning the time bound higher grade on completion of 10 years service must be War/Military service which counts for civil pension, in the case of non-gazetted officers. If the War/Military service does not count for civil pension, such service cannot also be taken into account for the purpose of sanctioning a time bound higher grade. In the circumstances, eligibility for a time bound higher grade in terms of Ext.P1 Government Order has to be determined with reference to the statutory rules which govern the computation of civil pension reckoning previous War/Military service as well. The statutory provision in question is Rule 8

(c) of Part III of the Kerala Service Rules which makes it clear that Ex-servicemen re-employed in civil services shall be allowed to count their military service, which is non-pensionable or pensionable under the Military Rules, but which is terminated before a pension has been earned in respect of it. In other words, where the War/Military service is pensionable service and pension has been earned by the incumbent in relation to such service, the same shall not be reckoned for the purpose of civil pension. This aspect has been made clear by this court in **Krishnan Nair v. State of Kerala {2000) 2 KLJ 815}**. It is admitted by the petitioners in the present case that they are in receipt of Military pension. Consequently, the service rendered by them in the Army cannot be reckoned for the purpose of civil pension. Ipso facto such service cannot be taken into account for the purpose of the grant of time bound higher grade as well. Essentially, Rule 8 (c) must be treated as incorporated in the Government Order, Ext.P1, to determine the eligibility of a person for time bound higher grade. What is involved can be broadly stated as incorporation by reference, though strictly

speaking Rule 8 (c) of Part III Kerala Service Rules is a statutory rule and Ext.P1 Government Order is a non-statutory executive order of the Government.

8. In the circumstances, the petitioners are not entitled to reckon their War/Military service for the grant of time bound higher grade. Consequently Exts.P6 to P8 orders by which they were granted such time bound higher grade was illegal and it was rightly interfered with in Ext.P9 order.

9. The second question relates to whether the respondents are entitled to recover the excess benefits drawn by the petitioners consequent upon the grant of the higher grade. As a matter of fact, this issue arises only in W.P.(C)No.10053/06 inasmuch as the actual disbursal of the benefits consequent upon the sanctioning of the higher grade, took place only in W.P.(C)No.10053/06.

10. Learned counsel for the petitioners has also referred to the decisions of the Supreme Court as also of this court for purpose of contending that even if there is conferment of benefit on a Government servant or an employee by an erroneous application of Rule or an order,

recovery should not be effected when the original fixation is set right at a later point of time, unless an erroneous fixation was brought about by the contribution on the part of the employee. On the other hand, the learned Government Pleader brought to my notice the decisions of this court for the position that where any benefit has been drawn by an employee on account of an erroneous application of the Rule or a fixation of the pay, the benefit that was unduly drawn must be refunded to the Government consequent upon the cancellation of the erroneous fixation. The position in law does not seem to be free from a divergence of opinion and therefore, it would be useful to refer to the major decisions on the point as part of an attempt to detect an area of concurrence.

11. In **Sathyapalan v. Deputy Director of Education** reported in **{1998(1) KLT 399}**, a learned single Judge of this court took the view that cancellation of the grant of an increment and consequent pay fixation after a fairly long gap of time is liable to be treated as illegal and arbitrary. The learned single Judge held so while upholding the

cancellation of the erroneous fixation. In **Sreedharan v. Union of India {2002(1) KLT 444}**, a Bench of this court upheld the power to correct mistakes and regulate pension prospectively in accordance with the Rule. But the learned Judges observed that the exercise of power after 7 years of the retirement of the Government servant, cannot stand scrutiny in the light of the mandate to act fairly and reasonably, radiating from Article 14 of the Constitution of India. The learned Judges have, in the said decision actually interfered with the order impugned in the said case on merits itself. Though rested on a lightly different strain of reasoning, **Sasidharan v. Reserve Bank of India** reported in **{1990(2) KLT 573}** and **V.V.Prakasini v. K.P.S.C** reported in **{1993(1) KLJ 632}** underlines the principle in administrative law that the public authorities have power to correct apparent mistakes in orders, even without a specific provision.

12. In **Rose v. State of Kerala {2004(1) KLT 134}**, a learned single Judge of this court specifically considered the question as to whether the Government servant has a duty to pay back any excess amount received

due to erroneous fixation of pay. The learned Judge referred to Rule 3-C of Part III of the Kerala Service Rules and held that the said provision affords an adequate guideline to be followed in a case where there is a question of recovery of excess amount drawn by a Government servant consequent upon cancellation of an erroneous grant of a benefit which otherwise the Government servant was not entitled to. The following observations are significant:

> **"If an officer is denied any benefits, he has a right to insist for payments. Likewise, he owes a duty to pay back the excess received by him. The plea that amounts paid are appropriated, and one may find it difficult to pay it back, can only be a self-serving argument, and not equitable."**

13. A Bench of this court in **United India Insurance Co. v. Roy {2005(2) KLT 63}** stated the reasoning in the following eloquent words. The court held that notional business credit was extended to the respondent due to an inadvertent mistake and the appellant insurance company was entitled to correct the said mistake. It was further held as follows in paragraph 3 .

> **"On correction of the mistake necessarily excess amount paid has to be recovered especially when the**

> **respondent is a Development Officer. If the employee is a Class IV employee occupying lowest post in the establishment, some sympathetic consideration can be shown. There is no such consideration in the case of a person holding an officer post."**

14. In my view, the bench, while upholding the principle that excess benefits drawn consequent upon erroneous extension of such benefit is liable to be refunded, as a normal rule also did not exclude the possibility of there being exceptional circumstances which a court may take into account to restrain recovery, in the facts and circumstances of a particular case.

15. A learned single Judge of this court struck a different note from **Rose v. State of Kerala {2004(1) KLT 934}** in **Sivankutty Nair v. Secretary to Government** reported in **{2005(3)KLT 512}**. The learned Judge held that excess amount paid on account of wrong fixation of pay cannot be recovered unless the employee has, in any way, contributed to the mistake. **Sivankutty Nair's** case was overruled by a Division Bench in **Santhakumari v. State of Kerala** reported in **{2005(4) KLT 649}**.The bench enunciated

the principle of mutual mistake in initiating an action taken by an administrative authority, exercising powers under the Statute and the necessity to make a complete rectification of the said mistake. The court held that in a case where the mistake is mutual, "both the parties act on the same mistake and assumption". Court further held as follows:

> **"Person who pays the amount is on the legitimate belief that the person who receives the amount is entitled to receive it and the person who receives the amount is on the belief that he is entitled to receive the same. Mistake in such a situation, in our view, is mutual. Consequently same has to be set right in public interest unless there is statutory bar in recovering the amount."**

16. In **Santhakumari's** case, the Division Bench reiterated the principle in **United India Insurance Co. v. Roy {2005(2) KLT 63}**. The court went on to hold that the beneficiary is not entitled to retain the money, on equitable principles as well. In **Santhakumari's** case, the court expressly referred to **Rose v. State of Kerala** and affirmed the correctness of the said decision.

17. Another bench of this court, in the decision reported in **Principal Secretary to Govt. v. Gopala {2005(4)**

KLT 190} reiterated the principle that recovery of a benefit which was granted on erroneous fixation of pay is legal. Reference was made to Rule 3 C of Chapter I of Part III of the Kerala Service Rules to affirm the stand that the Government will have the right to recover the excess pay by resorting to appropriate mode as envisaged by the Rules.

18. Learned counsel for the petitioner brought to my notice the decision of the Supreme Court in **S.K.Saha v. Prem Prakash Agarwall {1994(1) SCC 431}** and **P.Thulasidas v. Govt. of A.P. {2003(1) SCC 364}** and the unreported judgment of a Division Bench of this court in **Rose v. State of Kerala {W.A.No.1434/04}**, which was an appeal against the judgment in **Rose v. State of Kerala**, reported in **{2004(1)KLT 934}**. Learned counsel also referred to the decision reported in **Jayasree v. State of Kerala {2002(3) KLT 803}.** In **Thulasidas v. Govt. of A.P.**, the Supreme Court was concerned with the validity of certain provisions in Andhra Pradesh Educational Service Untrained Teachers (Regulation of Services and Fixation of Pay) Act, 1991 to the extent to which the impugned provisions

retrospectively took away certain benefits conferred on such teachers. The decision of the Supreme Court rested on the fact that the original fixation of pay was in accordance with law, the fixation made earlier was governed by executive orders. It was only by the subsequent statute that the mode of fixation was changed. The Supreme Court held that the impugned provisions insofar as they retrospectively took away certain benefits which had been granted to the teachers were violative of Articles 14 and 16 of the Constitution of India. This is obviously a case different from one where a wrong fixation was subsequently cancelled. In the former, fixation was in accordance with law as was applicable at the time of fixation. In the latter, the fixation is found to be erroneous even as per the law which was applicable at the time of fixation.

19. **Jayasree v. State of Kerala reported {2002 (3) KLT 803}** is a decision of a learned single Judge of this court which dealt with a case where the applicability of Rule 37(b) of Part I of the Kerala Service Rules was involved. The learned Judge held that if erroneous excess payment

happened to be made bona fide, but by wrong interpretation of the statutory provision/Government order and not on account of any misrepresentation made by the concerned official, then the excess amount paid till the date of the rectification may not be recovered.

20. **Sahib Ram v. State of Haryana** reported in **{1995 Suppl.(1) SCC 18}** was a case where the Supreme Court specifically found that the fixation of a higher pay scale granted to a librarian was on the basis of wrong application of a Government order by the Principal of the College. The court held that the librarian was not at fault in the case at all.

21. The judgment of the Division Bench of this court in **Rose v. State of Kerala** [arising from **2004(1) KLT 934**] does not indicate any independent application of the principles involved, but went on to find that the excess payment made to the appellant was an error committed by the office and no fault could be attributed to the appellant in that regard.

22. Finally, the learned counsel made reference to a recent decision of the Supreme Court in **Aliyamma v.**

General Education Department {2007(3) KLT 700}. In the said decision, the Supreme Court held that a mistake apparent on the face of the record may be rectified. The court then held "we, therefore, in the peculiar facts and circumstances of this case, are of the opinion that with a view to do complete justice to the parties, the amount sought to be recovered may not be recovered from the appellant and we direct accordingly." **Aliyamma's** case will have to be confined to the facts of the case dealt with therein as the Supreme Court made it specifically clear in that regard.

23. On a consideration of the opinion expressed by the Supreme Court and by this court on different occasions, in my view, the preponderance of the judicial opinion seems to indicate the following:

> (i) If a wrong benefit has been drawn by a Government servant/employee, consequent upon an erroneous fixation of pay or an erroneous grant of some other benefit, then the benefit so received must be restored when the original erroneous order is cancelled or modified.

(ii) If the grant of a higher scale of pay or any other benefit was in accordance with law prevailing at that point of time, then a subsequent change in the law and a modification of the benefit once granted will not result in a recovery of the amount already drawn by the beneficiary. The change in law or modification of an order which earlier granted a benefit should operate only prospectively. A direction for recovery, in such circumstances, would be violative of Article 14 and 16 of the Constitution.

(iii) Even where the courts have held that there shall not be a direction for refund or recovery in circumstances where the fixation of pay or a grant of a benefit is found to be erroneous, the courts have consistently made an exception to the said position to instances where the concerned employees/beneficiaries had in some manner been responsible for the said mistake.

(iv) Where specific statutory provisions like Rule 3C of Part III of the Kerala Service Rules enables such recovery or refund of the amount erroneously availed of, then cancellation of an erroneous order should be

accompanied or followed by a direction for recovery.

(v) The courts have exercised the jurisdiction ex debito justitiae, to restrain recovery in certain cases where there is a long gap between the grant of the original benefit and the cancellation of the same and also in cases where the incumbent has long since retired by the time the original order of fixation is found to be erroneous and reviewed.

(vi) The preponderance of judicial opinion, therefore seems to uphold the validity of an action for recovery of an amount from a Government servant/employee, who is the beneficiary of an erroneous fixation of pay or some other higher grade, as in the present case.

24. The principle, as eloquently stated by the Division Bench in **Santhakumari'** is that the petitioner is enriched by the receipt of the benefit, the enrichment is at the expense of the public and the retention of public money is unjust.

25. In my view, even in cases where the courts have held that recovery should not be effected, the courts have been careful enough to carve out an exception in relation to cases where the beneficiaries have also contributed to the erroneous fixation of pay. What could be the degree of contribution on the part of the Government servant required in that regard? In my view if the Government servant specifically applies for a benefit which is not otherwise due to him, then obviously, he is a contributory to the mistake, if an erroneous fixation of pay or a grant of benefit is made accepting his request. The contribution on his part becomes more pronounced if his initial request is resisted by the authority, but he tenaciously pursues and then compels the authority to grant that benefit to him. An approach to the court of law seeking a mandamus to a reluctant superior officer, for considering the grant of such a benefit to him in circumstances where it is later found that he is not entitled to such benefit would also be a clear indicator of a contribution on the part of the employee concerned. The

direction for recovery, in such circumstances, would obviously not be illegal.

26. There could also be a situation in a case where the fixation of pay scale or grant of a benefit is governed by statutory provisions. Obviously where the fixation is found to be erroneous, it will also have to be found to be illegal in the sense that it is inconsistent with the statute. The second category of cases would be where a pay scale or some such benefit is governed by non-statutory administrative instructions, as in the case of a public sector undertaking or certain Government companies. In the latter case, there could possibly be an argument that relationship between the company and the employee is one contract of employment and therefore, fixation of pay or grant of any other benefit should also be treated as one rested upon a consensus ad idem between two contracting parties unlike in the case of Government servants.

27. Obviously, in the present case, the benefit is governed by executive orders of the Government, which has the force of law. There are no exceptional circumstances

which could be invoked in favour of the petitioner to restrain recovery of the benefits that he has erroneously drawn.

28. For all these reasons, I find no merit in these writ petitions and the same are, therefore, dismissed.

I make it clear that insofar as the petitioner in W.P.(C)No.10053/06 is concerned, he may approach the superior authorities for payment of the excess amount which he has drawn in easy instalments. If such a request is made by him, obviously the same should be sympathetically considered and appropriate orders passed.

Sd/-

(V.GIRI)

JUDGE

sk/

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